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No. 83-2030 <sup>(2)</sup>

ALEXANDER L. STEVENS,  
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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1983**

THE BOARD OF EDUCATION OF THE  
CITY OF OKLAHOMA CITY,  
STATE OF OKLAHOMA,  
*Appellant,*

*v.*

THE NATIONAL GAY TASK FORCE,  
*Appellee.*

**ON APPEAL FROM THE UNITED STATES  
COURT OF APPEALS, TENTH CIRCUIT**

**MOTION TO AFFIRM**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
OPINIONS BELOW.....	1
STATEMENT.....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT	
A. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Restricts Protected Expression .....	5
B. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Impermissibly Restricts Expression by Public School Teachers .....	6
C. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 is an Unconstitutionally Overbroad Restriction of Protected Expression.....	7
CONCLUSION .....	8

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Brandenburg v. Ohio</i> 395 U.S. 444 (1969) .....	5, 6
<i>Chaplinsky v. New Hampshire</i> 315 U.S. 568 (1942).....	6
<i>Connick v. Myers</i> ____ U.S. _____, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) .....	7
<i>Erznoznik v. City of Jacksonville</i> 422 U.S. 205 (1975) .....	6, 7
<i>Gooding v. Wilson</i> 405 U.S. 518 (1972).....	7
<i>Pickering v. Board of Education</i> 391 U.S. 563 (1968) .....	7
<i>Police Department of Chicago v. Mosley</i> 408 U.S. 92 (1972) .....	6
<i>Tinker v. Des Moines School District</i> 393 U.S. 503 (1969) .....	7
CONSTITUTIONS	
United States Constitution First Amendment .....	4, 5, 6, 7
STATUTES	
70 Okla. Stat. § 6-103.15 .....	2, 4, 6, 8

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**MOTION TO AFFIRM**

Appellee The National Gay Task Force, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States Court of Appeals for the Tenth Circuit be affirmed on the grounds the question is so unsubstantial as not to warrant further argument.

**OPINIONS BELOW**

The March 14, 1984 opinion of the Court of Appeals (Appellant Appendix A (hereinafter App. A), 1a-13a) is reported at 729 F.2d 1270. The June 29, 1982 opinion of the district court (Appellant Appendix B (hereinafter App. B), 1b-22b) is not reported.

**STATEMENT**

This case involves a facial constitutional challenge of an Oklahoma statute which permits school districts to dismiss public school teachers for making public statements on homosexuality. 70 Okla. Stat. § 6-103.15 provides:

**A. As used in this section:**

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
  - a. committed with a person of the same sex, and
  - b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teacher's aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in a public homosexual conduct or activity;
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors will be considered in making the

determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
3. Any extenuating or aggravating circumstances; and,
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

This case was tried before the district court on cross-motions for summary judgment, based on facts established by affidavit. These facts state that appellee, the National Gay Task Force, is a corporation which includes among its membership homosexual teachers employed by the Oklahoma City School District. These teachers wish to advocate civil and constitutional rights for homosexual persons, but are inhibited from expressing public or private opinions on these issues because of the possibility of dismissal from their jobs, or the foreclosure of future employment in the Oklahoma City School District. The National Gay Task Force challenged the statute on a number of constitutional grounds. Judge Luther Eubanks of the United States District Court, Western District of Oklahoma, held the law to be constitutional in all respects. (App. B, 1b-22b.)

The Tenth Circuit reversed, in part, holding that while the statute's restrictions of "public homosexual activity" were constitutional, the statute's restrictions of "public homosexual conduct" were an impermissibly overbroad regulation of protected expression. In short, the Tenth Circuit held that while Oklahoma may dismiss public school teachers who engage in certain sexual activities in public, the state may not dismiss public school teachers for merely speaking out on homosexuality.

The court declared unconstitutional only that portion of the statute which permits dismissal of public school teachers who engage in "public homosexual conduct." Section A(2) of the statute, which defines "public homosexual conduct," is disingenuously written; although it purports to regulate "conduct" it actually restricts speech, by punishing any public school teacher who "advocates, solicits, imposes, encourages or promotes" homosexuality. The Tenth Circuit recognized that the First Amendment protects mere "advocacy" and held that the statute had a "real and substantial" chilling effect on the expression of all Oklahoma public school teachers. The court concluded that the statute was not subject to a "narrowing construction" because by its very terms the statute restricts "advocacy" and other protected expression.<sup>1</sup>

### SUMMARY OF ARGUMENT

The portion of 70 Okla. Stat. § 6-103.15 held unconstitutional by the Tenth Circuit is clearly an impermissible restriction of protected speech. The statute, by its clear terms, permits the dismissal of public school teachers who "advocate," "promote" or "encourage" homosexuality. The statute does not require that such speech disrupt the school or interfere with the employee's job performance, nor does the statute require a showing that such speech is likely to produce imminent lawless action. The statute, in short, punishes a speaker solely because of the content of his expression.

Appellant Board of Education, unable to challenge the Tenth Circuit's legal analysis, mischaracterizes the statute and appeals to base prejudice. Appellant insinuates that the statute merely protects school children from sexual advances by school teachers. While such behavior is and should be punishable, it is not the subject of this statute. Even a casual reading of 70 Okla. Stat. § 6-103.15 reveals it for what it is: a heavy-handed attempt to limit debate on an important public issue, by forbidding all public school teachers from speaking out on homosexuality, in public or

<sup>1</sup> Judge Barrett dissented. (Appellant App. A, pp. 9a-13a.) In his view, advocacy of homosexual activity "does not merit any constitutional protection" (id. at 11a).

private, at any time and in any place. The First Amendment does not tolerate such far-reaching restrictions of speech.

### ARGUMENT

The decision of the Tenth Circuit is plainly correct. The court relied upon a quarter century of Supreme Court jurisprudence in holding that Oklahoma cannot punish public school teachers who make public statements on homosexuality. Appellant is unable to point to a single instance in which the Tenth Circuit's analysis diverges from prevailing authority.

#### A. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Restricts Protected Expression

The Oklahoma statute restricts protected expression because it subjects public school teachers to disciplinary procedures and possible dismissal simply for "advocating, soliciting, imposing, encouraging or promoting" homosexuality. The Tenth Circuit correctly applied the applicable law in stating that the First Amendment protects such expression.

The First Amendment protects "advocacy" even of illegal conduct except when "advocacy" is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)

....

"Encouraging" and "promoting," like "advocating," do not necessarily imply incitement to imminent action. A teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute would be "advocating," "promoting," and "encouraging" homosexual sodomy and creating a substantial risk that his or her speech would come to the attention of school children or school employees if he or she said, "I think it is psychologically damaging for people with homosexual desires to suppress those desires. They should act on those desires

and should be legally free to do so." Such statements, which are aimed at legalizing social change, are at the core of First Amendment protections.

App. A, p. 6a.

Appellant asserts that there is a "substantial federal question" of whether *Brandenburg* applies to advocacy of homosexuality, apparently because the dissenting judge in the Tenth Circuit has declared homosexuality to be "malum in se." (Appellant Brief, p. 12.) Appellant also claims that there is a "substantial constitutional question" of whether "the encouragement, promotion or advocacy of the commission of criminal homosexual sodomy is entitled to any constitutional speech protection." (Appellant Brief, p. 14.) Appellant offers no authority for its novel theory that while the First Amendment protects advocacy of violent revolution, it does not protect advocacy of homosexuality. Such a theory is antithetical to the First Amendment, for "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975), quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Furthermore, it is clear that speech relating to homosexuality does not fall within those narrow categories of speech not entitled to constitutional protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Tenth Circuit correctly held that 70 Okla. Stat. § 6-103.15 restricts protected expression.

#### B. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Impermissibly Restricts Expression by Public School Teachers

The Tenth Circuit held that 70 Okla. Stat. § 6-103.15 is an impermissible restriction of the expression of public school teachers because the statute restricts speech without requiring a showing that such speech disrupts the teacher's school or interferes with the teacher's job performance. (App. A at 8a.) The Tenth Circuit based its holding on the well-settled principles of this Court that a public school teacher's speech may be restricted only where there is proof that the speech "would materially and

substantially interfere with the requirement of appropriate discipline in the operation of the school," *Tinker v. Des Moines School District*, 397 U.S. 503, 509 (1969), or where the speech interferes with the performance of teaching duties. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The Tenth Court followed this Court's recent teaching "that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S. Ct. 1684, 75 L. Ed. 2d 708, 716-17 (1983).

The Tenth Circuit carefully analyzed the statute, and found that it restricts far more than expression which is materially disruptive to the school or a teacher's job performance. The court stated:

The statute does not require that the teacher's public utterance occur in the classroom. Any public statement that would come to the attention of school children, their parents, or school employees that might lead someone to object to the teacher's social and political views would seem to justify a finding that the statement "may adversely affect" students or school employees. The statute does not specify the weight to be given to any of the factors listed. An adverse effect is apparently not even a prerequisite to a finding of unfitness.

(App. A at 8a.)

**C. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Is an Unconstitutionally Overbroad Restriction of Protected Expression**

The First Amendment overbreadth doctrine rests on the notion that to be constitutionally valid, a "statute must be carefully drawn or be authoritatively construed to punish only unprotected speech." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). A statute may be invalidated under this doctrine when it "is not readily subject to a narrowing construction by the state courts . . . , and its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

The Tenth Circuit followed these well-settled principles in holding a portion of the Oklahoma statute unconstitutionally overbroad. The Tenth Circuit correctly found that this statute would have a substantial "chilling effect" on the exercise of free speech because "[the statute] applies to all teachers, substitute teachers and teachers' aides in Oklahoma. *To protect their jobs they must restrict their expression.*" (App. A at 7a (emphasis added).)

The Tenth Circuit was also correct in finding that the Oklahoma statute is not "readily subject to a narrowing construction."

[T]he statute by its plain terms is not easily susceptible to a narrowing construction. The Oklahoma legislature chose the word "advocacy" despite the Supreme Court's interpretation of that word in *Brandenburg*.

(App. A, 6a-7a.)

The Tenth Circuit hence correctly applied *Erznoznik* in holding a portion of 70 Okla. Stat. § 6-103.15 to be unconstitutionally overbroad.

**CONCLUSION**

The opinion below should be affirmed because the Tenth Circuit correctly applied well settled principles of constitutional law and because appellant presents no substantial question for the decision of this Court.

Respectfully submitted,

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